



UNITED STATES DEPARTMENT OF COMMERCE
The Assistant Secretary for Communications
and Information
Washington, D.C. 20230

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

The Honorable William E. Kennard
Chairman
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Ex Parte** -- Deployment of Wireline Services Offering Advanced
Telecommunications Capability, CC Docket No. 98-147

In the Commission's August 7, 1998 Memorandum Opinion and Order in the above-captioned proceeding, the Commission tentatively concluded that the digital subscriber line (DSL) services to be marketed by many incumbent local exchange carriers (ILECs) are telecommunications services provided to non-carrier customers.^{1/} Consequently, ILECs must make those services available to requesting carriers at discounted rates, in accordance with section 251(c)(4) of the Communications Act.^{2/}

A number of ILECs are now requesting that the Commission revisit its tentative conclusion, at least with respect to DSL services marketed by ILECs to Internet service providers (ISPs).^{3/} Some ILECs apparently plan to offer those services to ISPs at rates below those charged to current residential and business customers. The size of the discount

^{1/} Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, 24029-24030, 24040, ¶¶ 35-36, 60-61 (1998) (Order and Notice). The Commission solicited comment on its conclusion in the accompanying Notice of Proposed Rulemaking. See id. at 24094-24095, ¶¶ 187-189.

^{2/} 47 U.S.C. §§ 251(c)(4), 252(d)(3) (Supp. II. 1996).

^{3/} See, e.g., Letter from Susanne Guyer, Bell Atlantic, to FCC Secretary Magalie Salas, CC Docket No. 98-147 (Mar. 12, 1999) (Bell Atlantic Ex Parte); Letter from Kathleen Levitz, BellSouth, to FCC Secretary Magalie Salas, CC Docket No. 98-147 (Mar. 12, 1999); Letter from W. Scott Randolph, GTE, to FCC Secretary Magalie Salas, CC Docket No. 98-147 (Mar. 11, 1999) (GTE Ex Parte).

generally will vary with the number of lines ordered and the duration of the agreement.^{4/} The ISPs will then combine the DSL services with their Internet offerings and market the bundled package to their own customers.

ILECs assert that if the DSL services they sell to ISPs are subject to the resale requirements of section 251(c)(4), ILECs would be compelled to make those reduced rate services available to requesting carriers at an additional discount. They contend that such an outcome would lessen ILECs' incentives to offer cut-rate service to ISPs, thereby slowing the deployment of DSL technology.^{5/} Accordingly, the companies urge the Commission to clarify that DSL services marketed by ILECs to ISPs are not subject to the provisions of section 251(c)(4).

The National Telecommunications and Information Administration (NTIA) believes that the Commission should grant the ILECs' request, subject to the conditions described below. The plain language of section 251(c)(4) obligates ILECs to make available to competing carriers only those "telecommunications services" that ILECs provide "at retail to subscribers who are not telecommunications carriers."^{6/} The key word, in this instance, is "retail." In the absence of evidence to the contrary, it must be assumed that Congress meant for that word to have its ordinary and common meaning^{7/} -- the sale of goods or services to the ultimate consumer for its own use.^{8/}

Plainly, ISPs are not the ultimate consumers of the DSL services that they acquire from ILECs. Rather, they resell those services to consumers as part of a larger Internet service offering. Like the access services that interexchange carriers purchase from ILECs,

4/ See, e.g., GTE Ex Parte, supra note 3, Attachment, at 2.

5/ See id. at 1; Bell Atlantic Ex Parte, supra note 3, Attachment, at 4.

6/ 47 U.S.C. § 251(c)(4)(A) (Supp II. 1996).

7/ See, e.g., Bailey v. United States, 516 U.S. 137, 145 (1995); Hanover Bank v. C.I.R., 369 U.S. 672, 687 (1962).

8/ See Black's Law Dictionary 1315 (6th ed. 1990) (defining "retail" as "A sale for final consumption in contrast to a sale for further sale or processing (i.e., wholesale). A sale to the ultimate consumer"); American Heritage Dictionary 1054 (2d College ed. 1982) (retail is "the sale of goods or commodities in small quantities to the consumer"); Ballentine's Law Dictionary 1134 (3d ed. 1969) (defining a "sale at retail" as "A sale to a customer for his own use, or for the use of his family, rather than for resale by him in the course of business.").

DSL services are "an input component to the [ISPs] own retail services." As such, when provided to ISPs, those offerings, like access, are "fundamentally non-retail services."^{9/}

The Telecommunications Resellers Association (TRA) asserts that the sale of DSL to an ISP is a retail offering, "[j]ust as the sale of computer chips to a manufacturer of computers is a retail transaction."^{10/} TRA provides no authority for the latter assertion, however. Furthermore, there are fundamental differences in the dealings between a chip maker and a computer company and the dealings between the chip manufacturer and a classic retail customer -- the individual wishing to buy one or a few semiconductors for his or her own use. The computer company typically acquires its chips in substantially higher volumes, at significantly lower prices, and through a different distribution system than the individual. Given those dissimilarities, one cannot conclude that the both types of transactions are "retail" in the common sense of that word.

MCI WorldCom (MCI-W) contends that the ILECs' DSL services must be considered retail in nature because many of the ILECs are currently providing such services "to literally millions of new business and residential customers."^{11/} It apparently believes that once a service is retailed to some customers, the service must be considered a retail offering for all customers. While not implausible, MCI-W's theory is difficult to square with section 252(d)(3), which specifies the standard for establishing the discount for services that must be made available for resale under section 251(c)(4). Section 252(d)(3) requires that the discount

^{9/} Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15935, ¶ 874 (1996) (Local Competition Order).

^{10/} See Letter from Charles Hunter, Esq., to FCC Secretary Magalie Salas, CC Docket No. 98-147, Attachment at 1 (Mar. 11, 1999).

^{11/} Letter from Richard Whitt, MCI WorldCom, Inc., to FCC Secretary Magalie Salas, CC Docket No. 98-147, at 4 (Apr. 1, 1999). MCI-W asks why the ILECs "could not simply propose and adopt a non-discriminatory volume discount structure as a way to provide certain entities with more significant discounts; this way all users and carriers could benefit from discounts, based on the traffic they generate." *Id.* It neglects to mention that if DSL services are declared to be retail offerings in all circumstances, as MCI-W demands, competing carriers would be entitled to the relevant volume discount plus an additional deduction from that "retail" rate pursuant to section 251(c)(4).

The company also notes that, for ISPs, DSL services are an alternative to the business lines they have used "to provide their customers with dial-up Internet access." *Id.* at 4 n.14. Because those business lines are clearly retail services, MCI-W says, the DSL services that replace them must be as well. That is akin to a claim that because a screwdriver can do a hammer's job in some instances, it must be classified as the same sort of tool.

be based on the "retail rates charged" for the service in question.^{12/} Read together, section 251(c)(4) and 252(d)(3) strongly suggest that an ILEC has no resale obligation with respect to services provided on a non-retail basis -- even if those same services are also sold at retail -- because there would be no retail rate on which to base a discount.

Consequently, the Commission should clarify that DSL services marketed by ILECs to ISPs are not "retail" offerings subject to the requirements of section 251(c)(4). On the other hand, they are assuredly "telecommunications services."^{13/} As a result, ILECs must comply with their basic common carrier obligations: to provide such DSL services upon reasonable request; on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements.^{14/} Thus, the same DSL rates must be available to all ISPs with similar levels of demand and lengths of contract.^{15/} Indeed, NTIA sees no reason why the rates that ILECs offer to ISPs should not be available to other potential buyers, including competing local exchange carriers (CLECs).

Further, when an ILEC chooses to market DSL services to residential and business customers, NTIA agrees with the Commission that those offerings are telecommunications services provided at retail to non-carrier customers and, thus, subject to section 251(c)(4).^{16/} Accordingly, ILECs would have to make those services available to competing carriers at discounted rates. Under section 252(d)(3) of the Communications Act, in the event that the affected parties cannot agree on a discount, the relevant State regulatory commission must determine a discount based upon the costs that will be avoided by the ILEC as a result of the resale arrangement.^{17/} To guide State commission deliberations in such cases, NTIA recommends that the Commission amend its rules for implementing section 252(d)(3) to create a presumption that the appropriate DSL discount for any particular CLEC should be no less

^{12/} 47 U.S.C. § 252(d)(3) (Supp. II 1996).

^{13/} See Order and Notice, 13 FCC Rcd at 24029-24030, ¶¶ 35-36.

^{14/} Among other things, LECs must show that the DSL rates that they charge to their ISP customers, including any volume and term discounts, cover all relevant costs of providing service, including a reasonable share of the costs of the underlying subscriber loop.

^{15/} In order to qualify for any available volume discount, an ISP should be able to aggregate its demand within the entire area served by the selling ILEC.

^{16/} See Order and Notice, 13 FCC Rcd at 24040, ¶¶ 60-61; Letter from Larry Irving, NTIA, to FCC Chairman William Kennard, CC Docket No. 98-147, at 2 (Jan. 11, 1999).

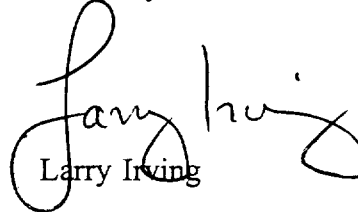
^{17/} 47 U.S.C. § 252(d)(3) (Supp. II 1996).

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than the reduction from the prevailing retail rate that the ILEC makes available to ISPs.^{18/} For example, if an ILEC gives a 30 percent discount from the applicable retail price to an ISP requesting 1,000 DSL lines on a 12-month contract, the same discount, at a minimum should be available under section 252(d)(3) to a CLEC with comparable demand for a similar length of time.^{19/}

Thank you for your consideration of these views.

Sincerely,



Larry Irving

cc: Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael Powell
Commissioner Gloria Tristani
Kathryn C. Brown, Chief of Staff
Lawrence E. Strickling, Chief, Common Carrier Bureau

^{18/} The Supreme Court's ruling in AT&T v. Iowa Util. Bd., 119 S.Ct. 721 (1999), affirmed the Commission's authority to adopt pricing rules governing ILECs' provision of interconnection, unbundled network elements, and resale pursuant to 251(c). See id. at 729-733. Although such a rule might produce discounts for DSL services different from those applicable to other resale services, the Commission has already concluded that, because avoided costs may vary from service to service, discounts need not be uniform across all services. See Local Competition Order, supra, 11 FCC Rcd at 15957-15958, ¶ 916.

^{19/} A CLEC would, of course, have an opportunity under section 252 to obtain an even larger discount than the one made available by an ILEC to an ISP (or any other customer) if the CLEC could demonstrate that the ILEC would avoid more costs by wholesaling DSL service to the CLEC, rather than to that other customer.